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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re BRENDA T., a Person Coming Under
the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

FREDERICK T.,

Defendant and Appellant.

G033982

(Super. Ct. No. DP001450)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Dennis Keough, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Marsha Faith Levine, under appointment by the Court of Appeal, for
Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, and Beth L. Lewis, Deputy County
Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

* * *

INTRODUCTION

Brenda T., now 12 years old, has been a dependent of the juvenile court for more than five years, and her biological father, Frederick T., is still unable to provide her with a stable home. Throughout the dependency period, Frederick has maintained regular, positive visitation with Brenda. Brenda wants to continue visits with Frederick, even if she is adopted, and her prospective adoptive father testified he and his wife are willing to permit and facilitate those visits.

Frederick appeals from the juvenile court's judgment terminating his parental rights, arguing the applicability of the beneficial parent-child relationship exception to the termination of parental rights. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(A).) (All further statutory references are to the Welfare and Institutions Code.)

There was substantial evidence supporting the juvenile court's finding Frederick and Brenda's relationship did not outweigh the benefit to Brenda of adoption. Therefore, we affirm.

STATEMENT OF FACTS

In August 1999, the Orange County Social Services Agency (SSA) placed Rachel T. (then age 10) and Brenda T. (then age 6) in protective custody. In the petition, SSA alleged Rachel and Brenda's father, Frederick T., had left his children in the care of an unrelated male adult, Harry B., for approximately one year. SSA further alleged Harry had physically and sexually abused the children. Frederick was alleged to have a history of substance abuse, and to have injured Brenda by pushing her against a wall. The whereabouts of Rachel and Brenda's mother were then unknown.

A separate dependency petition was filed later in August for Rachel and Brenda's older sister, Christy T. (then age 13).¹ (Because this appeal only addresses Frederick's parental rights vis-à-vis Brenda, we will not further discuss the petition involving Christy.) One brother, Richard T., was apparently living with Frederick. Another brother, Dillan T., was detained at birth because he tested positive for cocaine.

At the jurisdiction and disposition hearing, Frederick pleaded nolo contendere to the petition, and the mother submitted. The court found the allegations of the petition true by a preponderance of the evidence, and declared Rachel, Brenda, and Christy to be within the juvenile court's jurisdiction. The court also found (1) reasonable efforts had been made to avoid the need to remove the children from the home, (2) there was a substantial danger to the well-being of the children if they were returned home, (3) continued placement of the children outside the home was appropriate and necessary, and (4) efforts had been made toward alleviating the causes necessitating placement.

Rachel and Brenda were placed together in a foster home, and Christy was placed in a group home. Frederick regularly visited with Rachel and Brenda; after a change in Rachel and Brenda's foster care placement, Christy was able to visit regularly with them as well. After the jurisdiction and disposition hearing, the children's mother ended her contact with the social worker, failed to perform her case plan, and failed to appear at any further court proceedings.

In the six-month review report, the social worker noted, "It is the opinion of the undersigned that the parents in this case are not likely to complete their case plans. The mother has refused any contact with the undersigned or the children, and it is not likely that she will seek contact in the future. The father has failed to keep appointments with the undersigned, but does visit his children. The children enjoy visits with their father, and would like them to continue. The undersigned, therefore, recommends

¹ Christy is also referred to in the appellate record as Christine or Christina. We will refer to her as Christy in order to minimize confusion.

permanent placement and long[-]term foster care for these children. Such a plan would allow them the permanency of a home, but still afford them visits with their father.” At the six-month review hearing, the court (pursuant to the parties’ stipulation) found continued placement for the children was necessary.

In the 12-month review report, the social worker noted Frederick had continued to visit Rachel and Brenda on a weekly basis, and Rachel and Brenda saw Christy while visiting with Frederick. Frederick told the social worker that because of his lack of secure employment, “he is not ready for his daughters to come home, preferring to wait until he has a more permanent lifestyle.” The social worker observed, “This is a father who appears to love his children. He is fairly consistent in visiting with them each week and talks with them on the phone during the week. However, he does not have the means to take care of them; nor does he seem to have the motivation. Although very experienced in his field, he continues to work only day labor. This is the main issue that brought them to the attention of the court. He could not care for them, so [he] had them living with a ‘friend,’ who abused them.”

At the 12-month review hearing, the court, again pursuant to the parties’ stipulation, found (1) continued supervision was necessary, (2) return of Rachel and Brenda to Frederick would create a substantial risk of detriment to their well-being, (3) continued placement of Rachel and Brenda in foster care was appropriate and necessary, and (4) reasonable services had been provided to Frederick.

Prior to the 18-month review hearing on February 15, 2001, the parties stipulated that return of Rachel and Brenda to Frederick would create a substantial risk of detriment to their well-being, reasonable services had been provided to Frederick, reunification services to Frederick should be terminated, and Rachel and Brenda were not adoptable and should remain in long-term foster care. The court made its orders and findings consistent with the parties’ stipulation.

At periodic review hearings conducted on January 31 and July 24, 2002, the court found Rachel and Brenda's current placement was appropriate, and a permanency hearing under section 366.26 would not be in their best interests. The court ordered Rachel and Brenda to remain in long-term foster care.

On August 28, 2002, Brenda's placement was moved to Crittenton Services for Children and Families, a group home. Brenda continued to visit regularly with Frederick, Rachel, and Christy.

At a periodic review hearing on January 17, 2003, the court set a permanency hearing for Rachel, but found Brenda's placement continued to be appropriate and a permanency hearing would not be in her best interest. At another periodic review hearing on July 8, 2003, the court again found Brenda's placement to be appropriate. On July 10, Brenda was moved to the home of foster parents Charles and Theresa S.

In a status review report filed December 9, 2003, the social worker reported Brenda "continued to progress in building a relationship with Mr. & Mrs. S[.] and currently refers to the[m] as 'mom' and 'dad.' The S[.]'s care for Brenda and meet her mental, physical and educational needs at this time. Brenda appears to be doing well in her home. The undersigned has observed Brenda in the family setting. She appears to be comfortable in the home as she refers to the S[.]'s as her 'family'. She also appears to have a strong relationship with Rick, the S[.]'s biological child. Brenda excited [*sic*] shared with the undersigned about her bedroom and computer room that the family shares, as well as the family routine. The undersigned has observed Brenda with her foster parents. Brenda presents as though she were bonded with the family, as well as the family expressing positive regard toward Brenda." Frederick continued to visit with Brenda, and the S.'s assisted Brenda in maintaining contact with Rachel and Christy.

The S.'s expressed a desire to adopt Brenda. SSA's assessment regarding Brenda was, "[a]t this time, the child is doing well in her foster home. Mr. and Mrs. S[.]

care for Brenda and she appears to care for them as well. At this time, the S[.]’s are ready to move forward with the adoption process. The S[.]’s have maintained that they are open to having Brenda maintain limited contact with her father. The undersigned believes that it is in the child’s best interest to move forward with the adoption process.” On December 18, 2003, the court granted Mr. S.’s request for de facto parent status.

At the periodic review hearing on January 6, 2004, the court set a date for the permanency hearing as to Brenda, and found long-term foster care was no longer appropriate for her.

At the permanency hearing (which began April 29, 2004), the social worker testified that while Brenda had been apprehensive about being adopted before her placement with the S.’s, she had changed her mind and was now willing to be adopted, as long as she would be able to maintain contact with Frederick. At the time she prepared the December 2003 report, the social worker was aware the S.’s would allow limited contact between Brenda and Frederick, which the social worker testified would be “once every two months or so.” The social worker had not told Brenda her contact with Frederick would be so limited. At that time, Brenda had weekly unmonitored visits with Frederick.

Brenda testified she visits with Frederick for one hour every Sunday afternoon, and Christy and Richard often come with Frederick. Brenda has a good time during the visits and is happy to see Frederick. Brenda also talks to Frederick for one-half hour every Wednesday night. Brenda testified she loves Frederick; he, Christy, and Richard are important to her; and visiting Frederick makes her feel happy.

Brenda testified she wants to be adopted by and live with the S.’s, but she still wants to see Frederick every week. The S.’s had told Brenda she could continue to see Frederick after adoption. Brenda testified that as long as she could continue to see Frederick and talk to him on the phone, it would be okay if the visits were not as frequent. If Brenda visited Frederick once a month or once every other month, “I would

want it to be like more than that because that's when I used to see my sisters. And it's too long to wait that long."

Brenda referred to the S.'s as her "parents" and called them "[m]om and dad." Brenda testified the S.'s "feel like" her parents, take care of her when she gets hurt, and help her with homework. She also testified Frederick is like a parent. When asked what kind of "parent things" Frederick does, Brenda replied, "he takes care of Richard and Christina like that. And I don't know. I can't think of anything else."

Mr. S. testified he and his wife love Brenda and want to adopt her. The S.'s are willing to foster the relationship between Brenda and Frederick. Contrary to the social worker's testimony about visits "once every two months or so," Mr. S. testified the S.'s would continue the visits on a weekly basis, though at some time in the future they might change the schedule to have the visits every other week. Mr. S. also testified they would continue the visits with Brenda's siblings. With regard to Brenda's visitation with Frederick, Mr. S. testified:

"Q You realize that [Brenda] is close to her biological father, at least in terms of wanting to see him again?

"A Yeah. She has a relationship with him.

"Q And are you willing to foster that relationship?

"A Yes.

"Q If Brenda wants to see the father, are you willing to give her a visit with the father?

"A Yes.

"Q Even after parental rights are terminated –

"A Yes.

"Q – if they are. [¶] And is there any set level of visitation that you're going to impose on Brenda?

“A No. [¶] Presently, it’s weekly. At sometime in the future it might be nice to relax down to something maybe every other week. But for right now, we couldn’t change.

“Q Would you always go by Brenda’s wishes in that regard?

“A Yes. [¶] . . . [¶]

“Q How do you feel about Brenda visiting with her father?

“A I think it’s healthy for her, and I think it’s good for her. . . . She’s had a long relationship with him, and I think she needs to continue to have that relationship, unless she decides to be a rebellious teen and shine us all. I think for the most part it’s a good relationship. [¶] It’s – for me as a parent, I would always like to have her all to myself, but that’s not fair to her. [¶] . . . [¶]

“Q When you talk about Brenda’s feelings about her dad, what are those feelings?

“A I think – well, she has good, positive feelings. And right now she sees him one hour a week. And we really try and minimize the desserts in the house and special foods. And one thing that they like to do is go to Dairy Queen and get an ice cream. So it’s something she doesn’t do the whole rest of the week, so it’s a high point of her week for her. So I think she says – it [is] a good hour a week that she looks forward to each week.

“Q Aside from getting the ice cream, do you think there’s something special to her about her relationship with Mr. T[.]?

“A Well, I think she needs that. He’s her biological father. Of course that builds the bond because they have characteristics that they share.”

Mr. S. explained that his wife was adopted, enabling the S.’s to better understand the importance to Brenda of maintaining contact with her biological family. “My wife has – was adopted by her father at a very young age because it’s her mother’s second marriage. That’s the father that she grew up with. But she has half-siblings in

Oklahoma that she met in adulthood; also got to know her biological father in adulthood a little better. I think that helps us to see the importance that kinship plays and the importance to know your kin. So it's something that when we read it in the report [that Brenda regularly visited with Frederick and her sisters], it's something we knew we wanted to support and bring to this case."

Mr. S. also acknowledged that if the S.'s adopted Brenda, they would have the final say on whether she continued to visit with Frederick. Mr. S. testified:

"Q . . . You're aware if you're the adoptive parents, you're aware you can do pretty much anything you want? If you change your mind and thought [visitation with Frederick] wasn't good for her, that would be your call?

"A I understand, but [curtailing visitation] wouldn't be good for her. It wouldn't be good for us. It wouldn't be good for him. [¶] The only circumstance where I would see visits curtailing is if something happened with Brenda where she said I don't ever want to see him again. And again, I don't see that happening as well. But it would be entirely with her. As long as she wants to continue to see him, we will continue to foster the visits."

Frederick testified that during his weekly visits with Brenda, they talked "[a]bout school and stuff like that, goings on, how she's liking where she's at, and stuff like that, if anything's bothering her." During visits they swim in the ocean, and talk about her school grades. Frederick had offered Brenda advice on problems she had with other children in her previous placements. During their telephone conversations, they talk about "[h]ow school is, where she's at right now, . . . how things are going on over there, . . . stuff that a dad would ask curiously." Richard and Christy visit with Brenda about once a month.

Frederick acknowledged Brenda missed having a mother figure in her life. Frederick believed Brenda saw him as a parent rather than a friend because "not everything that I say to her is what she wants to hear. Some of it might be, like, sensible,

put-her-in-check kind of a deal, you know, if she's messing up, and stuff like that, which parents do." Frederick also believed it would negatively affect Brenda in the long-term if she could not continue her relationship with her older brother and sister, or if she were not able to see Frederick any longer. Frederick admitted (1) he could not provide Brenda with financial stability as of the time of the permanency hearing, (2) Brenda was getting a stable lifestyle with the S.'s, and (3) Brenda wanted to stay with the S.'s.

On May 19, 2004, the court found (1) Brenda was adoptable, (2) none of the exceptions of section 366.26, subdivision (c)(1) applied, (3) adoption and termination of parental rights were in Brenda's best interests, (4) Frederick's visitation with Brenda had been consistent, (5) the relationship between Frederick and Brenda was not such that the adoption should not proceed, (6) adoption would not cause a significant disruption of Brenda's relationship with her siblings, and (7) Brenda's desire was to be adopted. The court therefore terminated the parental rights of Frederick and the mother. Frederick appealed.

DISCUSSION

I.

STANDARD OF REVIEW

In reviewing the juvenile court's decision to terminate parental rights under section 366.26, we consider whether there was substantial evidence supporting the court's findings. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 423.) We presume the court's order is correct, and make all reasonable inferences and resolve all evidentiary conflicts in favor of affirming the order. (*Ibid.*) When the issue on appeal is whether the court erred in failing to apply one of the statutory exceptions to termination of parental rights, we consider whether there was substantial evidence to support the court's decision. (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 424-425.)

II.

BENEFICIAL RELATIONSHIP EXCEPTION

Under section 366.26, subdivision (c)(1), parental rights shall be terminated if there is clear and convincing evidence of adoptability. But an exception exists where a parent has “maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(A).) Frederick had the burden of proving the predicate facts to this exception. (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1119-1120.) He does not challenge the trial court’s finding Brenda is adoptable. There is no question Frederick maintained regular visitation with Brenda, so we turn to the issue of the existence of a beneficial relationship.

“A beneficial relationship is one that ‘promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.’ [Citation.] The existence of this relationship is determined by ‘[t]he age of the child, the portion of the child’s life spent in the parent’s custody, the “positive” or “negative” effect of interaction between parent and child, and the child’s particular needs’ [Citation.]” (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206.)

“To overcome the preference for adoption and avoid termination of the natural parent’s rights, the parent must show that severing the natural parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed. [Citations.] A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent. [Citation.]” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

Although Brenda was almost 12 years old at the time of the permanency hearing, she had not lived with Frederick for at least five years before the hearing. Brenda had been in foster care or a group home since her detention in August 1999, and

lived with Harry B. for approximately one year before that. The evidence of exactly how long Brenda lived with Frederick is in conflict. At the time of the children's detention, Harry, Harry's former girlfriend, and Rachel told the social worker that Rachel, Brenda, and Christy had lived with Harry for five years before August 1999. Later, Brenda, Rachel, and Christy told the social worker they had lived with Harry for only one year. The original petition was amended to change the allegation that the children had lived with Harry for five years to "approximately one year," and Frederick pleaded no contest to the amended petition.

It was undisputed Brenda and Frederick have a positive relationship. It was less clear, however, that "severing the natural parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed." (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 466.) Mr. S. testified Brenda's visits with Frederick would remain the same as they were, and that the S.'s understood the importance to Brenda of maintaining contact with Frederick. (As noted, the social worker testified the S.'s would permit "limited contact" between Brenda and Frederick.)

Frederick is correct in arguing there is no guarantee his visits with Brenda will continue. The order terminating parental rights does not require the S.'s to permit any type of visitation, and once the S.'s adopt Brenda they will have the absolute say whether visits between Frederick and Brenda stay the same, increase, or decrease in frequency and duration, or continue at all. The juvenile court was in the best position to assess and evaluate Mr. S.'s testimony concerning visitation, and to determine whether the need to ensure continued visitation with Frederick outweighed the benefits to Brenda of adoption. We do not conclude the court erred in its evaluation.

Adoption will provide Brenda with the stability Frederick has been unable to provide, or would be able to provide in the foreseeable future. Adoption will also provide Brenda with a mother at a time when Frederick acknowledged she needed a mother figure in her life.

There was no showing by Frederick that the benefit to Brenda of their parent-child relationship outweighed the benefits of adoption. The testimony was undisputed Brenda wanted to continue visiting Frederick after adoption, and their unmonitored visits were positive and appropriate. There was, however, substantial evidence supporting the juvenile court's finding the benefits of the continued relationship would not outweigh the benefits of adoption. (*In re Amber M.* (2002) 103 Cal.App.4th 681, 690.)

III.

THE EXCEPTIONS UNDER SECTION 366.26, SUBDIVISION (C)(1)(B) AND (C)(1)(E) DO NOT APPLY IN THIS CASE.

Frederick argues the beneficial relationship exception should have been viewed in conjunction with two other exceptions to termination of parental rights over an adoptable child – the sibling relationship exception (§ 366.26, subd. (c)(1)(E)) and the exception for a child 12 or older objecting to adoption (§ 366.26, subd. (c)(1)(B)). Frederick does not argue either of these exceptions applies directly here. To the contrary, he agrees they do not. Frederick argues in his opening appellate brief, “the juvenile court’s decision failed to give any meaningful weight to these exceptions – even if neither one standing alone would justify an order precluding termination of parental rights.”

However, no general best interest exception exists in section 366.26, subdivision (c)(1). (*In re Josue G.* (2003) 106 Cal.App.4th 725, 734.) Accordingly, we analyze the beneficial relationship exception on its own merit, considering all the facts and circumstances. For the reasons stated above, it does not apply here.

Analyzed separately, neither of the other two exceptions argued by Frederick applies. Because Brenda was close to, but not yet, 12 years old at the time of the permanency hearing, section 366.26, subdivision (c)(1)(B) does not apply. Under section 366.26, subdivision (h)(1), the trial court was required to consider Brenda’s

wishes as part of the permanency hearing, which it did. Brenda testified she did not object to being adopted – indeed, she was in favor of it, as long as she could continue to see Frederick.

SSA argues Frederick waived his right to argue the sibling bond exception to adoption because he failed to raise it at the juvenile court hearing. (*In re Erik P.* (2002) 104 Cal.App.4th 395, 402-403.) Although Frederick did not specifically argue this exception in the juvenile court, SSA's counsel argued against the exception, and it was considered by the juvenile court.

Section 366.26, subdivision (c)(1)(E) permits the juvenile court to refuse to terminate parental rights over an adoptable child if it finds "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption."

Here, the juvenile court found adoption would not cause a significant disruption of Brenda's relationship with her siblings. Substantial evidence supported the court's finding. Mr. S. testified he and his wife would continue facilitating Brenda's visits with her siblings after adoption. Frederick offered no evidence to the contrary, and Mr. S.'s sincerity was a matter for the juvenile court to consider.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.